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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

Nos. 1170 and 1171.

No. 1170.—THE UNITED STATES, APPELLANT, vs. JOHN M. MUELLER.

No. 1171.—JOHN M. MUELLER, APPELLANT, vs. THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

FILED OCTOBER 24, 1884.

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1 I.—*Original petition.*—*Filed October* 23, 1878.—*A. H.*

In the Court of Claims.

JOHN M. MUELLER *sr.* vs. THE UNITED STATES. } No. 11962.

The above-named plaintiff, John M. Mueller, respectfully shows to this court as follows:

First. On the 2d day of September, 1872, he entered into a contract with the United States whereby he agreed to furnish, from his quarry in Adams County, in the State of Ohio, and from such part of said quarry as might be designated by the supervising architect or his agent, all the dimension stone which might be required in the construction of the custom-house, court-house, and post-office building in Chicago, and to deliver the same at the site of said building. One hundred thousand cubic feet of said stone were to be so delivered on or before the first day of January, 1873, and the residue at such times and in such quantities as might be required by the United States. It was also agreed that the said stone should be of the best quality to be obtained from that quarry, and that it should be of uniform color, free from flaws, stains, or discoloring matter.

2 On the part of the United States it was agreed that the plaintiff should be paid as follows, to-wit:

1. For every cubic foot in stones, the scheduled dimensions of which did not exceed one hundred cubic feet, $1.30.

2. For every cubic foot in stones, the scheduled dimensions of which exceeded one hundred cubic feet but did not exceed one hundred and fifty cubic feet, $1.35.

3. For every cubic foot in stones, the scheduled dimensions of which exceeded one hundred and fifty cubic feet, $1.47½. But, by the terms of the advertisement and proposals referred to in and by this contract, it was agreed and understood that no stones would be required having dimensions exceeding two hundred cubic feet. It was agreed that the said stones were to be furnished according to schedules of net sizes to be furnished by the United States, one-half (½) an inch to be added to such sizes for every worked face for quarried dimensions. Ninety per cent. of the price was to be paid on delivery of the stone, and ten per centum was to be retained until the completion of the contract.

A lease of the said quarry to the United States is incorporated in the contract by which the United States is authorized to take charge of the quarry and take out the stone in case of default on the part of the plaintiff.

The said contract was entered into after due advertisement and competing bids.

Second. On the 9th day of December, 1872, he entered into another contract with the United States, whereby he agreed to cut the stone to be used in the basement story, in the sill and lintel courses of the said building, and agreed to deliver the stone for the area walls, cut and ready for setting, on or before March 1st, 1873, and the pier stones and the sill

3 and lintel courses as soon thereafter as might be required by the United States. For this labor the United States agreed to pay the plaintiff the sum of $41,000.00, nine-tenths of which was to be paid

in monthly payments, and ten per centum was to be retained until after the completion and acceptance of the work. It was stipulated in said contract that the plaintiff should "forfeit the sum of $100.00 per diem for each and every day's delay caused by the non-delivery of said cut stone."

Third. On the 18th day of July, 1873, he entered into another contract with the United States, whereby he agreed to furnish such number of mechanics and laborers as might be required from time to time by the United States, and all tools and materials necessary to cut, dress, and box all the stone required for the construction of the said building, and to cut said stone in such manner and at such place as might be required by the United States, and to furnish all the sheds, shops, and machinery necessary for the work. It was also agreed that all material required for the cutting and boxing of such stone should be supplied only upon the requisition of the United States. It was further stipulated that not less than two hundred and fifty stone-cutters, with the necessary complement of mechanics and laborers, should be employed at any time during the progress of the work. For such labor and material it was agreed that the United States should pay "for the labor full market rates for the labor actually performed, increased by fifteen per centum, and for the material the lowest trade prices, increased by fifteen per centum thereof." Such payments were to be made monthly upon the certificates of the proper officer. It was also agreed that the superintendent of the building, in case of any delinquency or failure on the part of the plaintiff, might purchase and provide the materials and labor, and deduct the expense, together
4 with fifteen per centum, from any moneys due the plaintiff, or in his discretion might charge the plaintiff at the rate of $500.00 per day from the date of such delinquency to the final completion of said cutting.

Fourth. On the 4th day of August, 1873, he entered into another contract with the United States, whereby he agreed to furnish all the tools, machinery, shops, sheds, &c., required therefor, and to saw such stone supplied by him under his contract of September 2d, 1872, and hereinbefore mentioned, as might be deemed necessary by the United States. It was also stipulated that no quarry dimensions should be allowed on sawed faces of stone, and the allowance of one-half inch on each worked face of stones supplied, as provided for in said contract of September 2d, 1872, was expressly surrendered by the plaintiff. Such sawing was to be done at such times and in such quantities as the agents of the Government might require. For such services the United States agreed to pay the plaintiff at the rate of 35 cents per superficial foot, face measure, ninety per centum of which was to be paid monthly, and ten per centum upon the completion and acceptance of the entire work. It was also agreed that the superintendent of the building, in case of any failure on the part of the plaintiff, might purchase and provide the materials and labor for such work, and deduct the same with fifteen per centum from any moneys due the plaintiff, or, in his discretion, might charge the plaintiff at the rate of $100.00 per day from the date of such delinquency to the final completion of the sawing required.

Fifth. Each of the said contracts was in writing and under seal, and

was duly approved by the Secretary of the Treasury, and penal bonds in large sums for the faithful performance of each was required and taken from the plaintiff.

Sixth. By the terms of the said contract for dimension stone, stones containing two hundred cubic feet, or less, were provided for, but no provision was made for stones whose dimensions should exceed two hundred cubic feet. During the progress of the work the officers of the Government in charge of said building required and directed the plaintiff to, and he did, furnish sixty-three stones whose quarried dimensions exceeded two hundred cubic feet, which stones were used in said building. That these stones, exceeding in dimension two hundred cubic feet each, were reasonably worth the sum of $5.50 per cubic foot, and that the United States has refused and still refuses to allow him more than $1.47½ per cubic foot, and he claims for the difference the sum of $75,897.25.

Seventh. It is a rule and custom in all quarries and amongst all quarrymen that stones shall be quarried during the proper season, to wit, between the 1st day of May and the 1st day of October in each year, in order that sufficient time shall be allowed for the stones to become seasoned, and that said contract of September 2d, 1872, was made in reference to said custom, by both the plaintiff and the representative of the defendant. But that in the year 1873 the defendant neglected to furnish the necessary "schedules of net sizes" early enough to enable the plaintiff to quarry the stones under said contract and to give them sufficient time to become dry before the cold weather set in. In co'sequence of this neglect many stones were burst*ed* and destroyed by frost and became a loss to the plaintiff.

In many instances after stones had been delivered in Chicago by the plaintiff to the defendant's officers, under the said contract of September 2d, 1872, the agents of the defendant carelessly left said stones in exposed positions, by reason whereof many of them were broken and de-
6 stroyed by the action of the frost, and the plaintiff was thereupon required by the officers of the United States to furnish other stones in lieu of those broken and destroyed, and that they wrongfully refused and still refuse to pay the plaintiff anything whatsoever for such broken stones. And the plaintiff claims on account of stones broken by frost as aforesaid the sum of $18,176.77.

Eighth. During the years 1874 and 1875 the plaintiff furnished and cut a great number of large stones, and delivered the same to the United States in pursuance of his said contracts, and that said stones were accepted and received by the proper officers of the Government, and the plaintiff was thereupon paid for them, but subsequently the said stones were injured or destroyed by the action of frost, or by careless handling on the part of the defendant's officers or laborers, and thereupon the superintendent of the said building assumed to, and wrongfully did, deduct the value of said stones so cut, injured, and destroyed, from vouchers or accounts issued and due to him, the plaintiff, for other and subsequent materials and labor, and the amount of which deduction has never been paid to him, and the plaintiff claims on this account, $5,618.03.

Ninth. During the progress of the work of the plaintiff in fulfilling the said three contracts, to wit, that of September 2d, 1872, for materials; that of July 18th, 1873, for cutting stone; and that of August 4th, 1873,

for sawing stone; and after August, 1873, the officers of the United States unlawfully and wholly suspended the work under said contracts at two or more different times, and each time kept idle the plaintiff and his mechanics, laborers, machinery, tools, quarries, stone-yards, and capital for long periods of time, to his great damage. And the same officers unlawfully and repeatedly interfered with the plaintiff in the execution of the said contract of July 18, 1873, for cutting stone, and, notwith-
7 standing that the said contract provides that "not less than two hundred and fifty stone-cutters, with the necessary complement of mechanics and laborers, shall be employed at any time during the progress of the work," the said officers, during the years 1875, 1876, and 1877, wrongfully compelled the plaintiff to reduce the number of stone-cutters, mechanics, and laborers upon said work of cutting stone much below the minimum number prescribed by said contract, and compelled him, from time to time, to go on with the work with a largely diminished number of men, by which wrongful interference and reduction of his said force the plaintiff was greatly damaged, and he claims damages for and on account of said suspensions and said interferences and reductions of his working force, in the sum of $150,000.00.

Tenth. After the said contract of December 9, 1872, had been made, the plaintiff immediately prepared himself to fulfil the same by employing laborers, skilled and unskilled, and providing the necessary machinery, tools, &c., but that the defendant's agents and officers neglected and refused to permit the plaintiff to proceed in the fulfilment of his contract until about the first day of March, 1873, and was he not permitted to conclude the work until late in the year 1873. That the plaintiff's quarry is and was then located near Cincinnati, in Ohio, and that his stone-yard and all his facilities for cutting and dressing stone were situated in Cincinnati, and that it was then and always has been the rule and custom among quarry-men and dealers in stone to cut and dress stone at their stone-yards before shipment in fulfilment of contracts for buildings, public or private; that at the time this said contract was made it was intended and understood by the plaintiff, and by the officer representing the Government, that the cutting stipulated for in and by the said contract should be done at his said
8 quarry near Cincinnati. The number of hours constituting a day's work established by custom and prevailing in Cincinnati at the date of said contract, and during the time of its execution, was ten, while in Chicago the number of hours constituting a day's work was only eight. But, notwithstanding these facts, the officers of the United States, soon after the work of cutting stone had been by the plaintiff begun in Cincinnati, ordered and peremptorily directed that the work of cutting the said stone under said contract should be performed in the city of Chicago and not in Cincinnati, and the plaintiff was thereby and thereupon compelled to transport rough stones and to shift his tools to Chicago, and to employ laborers in Chicago, and to pay them greater prices for their labor than he was paying and would have paid in Cincinnati, to his great damage and injury, to wit, in the sum of $36,636.96.

Eleventh. During the years 1875, 1876, and 1877, the officers in charge of the construction of the said building, in violation of the agreement with the plaintiff, refused to permit the plaintiff to cut a large quantity of stone

for said building, although the plaintiff demanded the privilege of cutting them under his contract, and wrongfully employed a force of workmen in behalf of the defendant, and caused the said stone to be cut for use in said building, and thus deprived the plaintiff of his legitimate profits upon stones thus unlawfully cut, and the value of the work of cutting said stone, as plaintiff is informed and believes, was about $100,000.00, and he claims for his percentage upon said work the sum of $15,000.00.

Twelfth. In pursuance of his said contracts of September 2, 1872, and August 4, 1873, he delivered large quantities of sawed stone, a small part of which has not been paid for, and that there is now due to him for certain stones so furnished and used for basement piers in said building, on the west front thereof, the sum of $5,183.05.

9 Thirteenth. At the time the plaintiff made his estimates in order to submit his proposal for furnishing said dimension stone, plans showing the general form and dimensions of said building were exhibited to him by the officers of the Government in charge of the preparations for the said building, and from such plans, and from the other information given him by the defendant at the time, it appeared that to construct said building about six hundred thousand cubic feet of dimension stones would be required, and he accordingly based his proposal upon said quantity of stone, and after the contract had been awarded to him he made the necessary preparations, at heavy expense, to furnish that quantity. And he avers, that if said plans as originally intended, and upon which the building was begun, and upon which the work proceeded for about three years, had been adhered to, not less than six hundred thousand cubic feet of stone would have been required for said building. But the defendant, in the years 1875 and 1876, and after the walls had been built up nearly two stories, and after a great part of the stone required for the building up to and to include the main cornice had been delivered by the plaintiff, the officers of the defendant determined to and did alter the said original plan of the said building by cutting off the stone towers, omitting the stone dome reducing the size of the main cornice and dispensing with the balustrade for said main cornice, and, generally, reducing the dimensions of the stones entering into the construction of the building above the main cornice; and also by substituting iron beams and brick arches on the portico of the west front of said building for the stone ceilings specified in the original plan. By reason of the said alterations of said building the quantity of stone required in the construction thereof was reduced about one hundred thousand cubic feet, and that by such unlawful alter-

10 ations the plaintiff lost all the profits he was entitled to, and would otherwise have received, on the said quantity of stone. The plaintiff further avers, that by these said unlawful alterations he was deprived of the profits he was entitled to and would have realized in cutting the said stone, and he claims for his damages incurred through said alterations the sum of $95,450, being $50,000.00 for his contract for materials and $45,450.09 on his contract for cutting said stone.

Fourteenth. The petitioner claims that there is actually and justly due to him from the United States by reason of the premises the full sum of $401,962.06, and he demands judgment in his favor and against the United States for the said sum of $401,962.06.

The petitioner further shows that he is the sole owner of the said claim, and that he has never assigned or disposed of it, or of any part of it.

JOHN M. MULLER.

ENOCH TOTTEN,
Attorney for Claimant, Washington, D. C.

DISTRICT OF COLUMBIA,
County of Washington, ss:

I, John M. Mueller, being first duly sworn, do depose and say that I am the claimant named in the foregoing petition, and that no assignment of said claim or of any interest therein has been made; that I am justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that I believe the facts as stated in said petition are true.

JOHN M. MUELLER.

Subscribed and sworn to by John M. Mueller, the claimant in the above cause, before me, this 21st day of October, 1878.

[SEAL.] SAM'L C. MILLS,
Notary Public.

11 II.—*General traverse.—Filed Oct.* 29, 1878.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney-General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Assistant Attorney-General.

12 III.—*Amendment to petition.—Filed, by leave of court, Feb'y* 27, 1884.

And now comes the said petitioner, and by leave of the court, first had and obtained, amends his original petition, by adding thereto the following averments and claims, to wit:

That under his said contract of September 2, 1872, he was bound to furnish, and the defendant was bound to receive from him, all the dimension stone which might be required in the construction of said post-office, custom-house, and court-house building in Chicago, and that in the construction of said building large quantities of dimension stone were necessary and were required for the construction of the steps and approaches leading up into said building, and that the agents of the United States, in violation of the said contract, made an agreement or agreements with other persons to furnish said stones, who did so furnish them, notwithstanding that your petitioner was ready, willing, and offered to furnish said stones for said

portions of said building. And your petitioner, by reason of said unlawful acts of said defendant's agents, in violating said contract, suffered great damages, to wit, in the sum of $45,787.48, for which he claims judgment, in addition to what is due to him by reason of the matters and things claimed for in his original petition.

[SEAL.] JOHN M. MUELLER.

Subscribed and sworn to before me this 19th day of February, at Cincinnati, Ohio.

LOUIS KRAMER,
Notary Public in and for Hamilton County, Ohio.

13 IV.—*Findings of fact and conclusion of law.*

FINDINGS OF FACT.

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

Immediately prior to the 23d day of July, 1872, the United States, by the Supervising Architect of the Treasury, by public advertisement, invited proposals for furnishing all the dimension stone required for the construction of a building for the custom-house, post-office, &c., in Chicago, which advertisement is as follows:

Proposals for dimension stone required in the construction of the new Government buildings at Chicago, Ill.

Sealed proposals will be received until the 23d day of July, 1872, at the office of the Supervising Architect, Treasury Department, for furnishing and delivering at the site of the proposed new United States Government building at Chicago, Illinois, all of the dimension stone required in its construction. The species of stone from which a selection will be made will be confined to granites, marbles, or sandstones, and the qualities especially insisted upon will be uniformity of color and texture and durability, and their capacity for working under the chisel or hammer; one sample $12 \times 12 \times 12$, showing on each face a different kind of cutting, and on one the natural fracture of the stone, must be submitted in all cases.

No stone that has not been tested by actual use in buildings for at least ten years will be considered, and absolute proof that it has been so used for that period must be furnished. The stone must further have a good grain, and be free from all discoloring substances, and the quarry from which it is procured must be fully opened and capable of furnishing the quality and quantity desired within one year.

About 260,000 cubic feet of stone will be required; the size of the stones cannot now be given, but will approximate 60 feet; the largest stones will not probably contain over 200 cubic feet.

The stone will be ordered on a schedule of net sizes in order that the contractor may make proper allowances for cutting in the quarrying, and on this schedule payment shall be made.

Bidders will state how soon they can commence the delivery of the stone, and the amount per week they can deliver. They will also state the average and maximum sizes of stone that can be obtained from their quarry.

No bids will be received except from the owners or lessees of the quarries from which the stone is proposed to be furnished. A certificate from the recorder of the county in which the quarry is situated that the bidder is the owner or lessee of the quarry must accompany each bid.

All proposals must be made on the printed forms to be obtained of the Supervising Architect at Washington, or collector of customs at Chicago, and be accompanied by a penal bond in the sum of fifty thousand dollars ($50,000) that the bidder will accept and perform the contract if awarded to him, and give bond therefor in the penal sum of one hundred thousand dollars ($100,000), and a valid and binding lease of the quarry to the Government, as security for the faithful performance of the con-
14 tract, the lease to take effect upon the failure of the contractor to comply with the terms of the contract; said lease to authorize the Government to take full possession of the quarry, and work it at the expense of the contractor in case of such default.

The right to reject any or all bids received is reserved.

Proposals must be inclosed in a sealed envelope indorsed "Proposals for dimension stone," and addressed to

A. B. MULLETT,
Supervising Architect, Treasury Department.

July 23, 1872, the claimant submitted the following proposal:

Proposals for dimension stone for the new Government buildings, Chicago, Ills.

CINCINNATI, *July 23d*, 1872.

I hereby propose to furnish dimension stone in accordance with the attached advertisement, delivered on the cars at Chicago, for the sum of one dollar and twenty cents ($1.20) per cubic foot for all blocks containing one hundred cubic feet (100) and under, and five (.05) cents extra per cubic foot for all blocks containing more than (100) one hundred cubic feet and less than (150) one hundred and fifty cubic feet, and (12½) twelve and a half cents extra per cubic foot for all blocks containing more than (150) one hundred and fifty cubic feet and less than (200) two hundred cubic feet, and (25c.) twenty-five cents extra per cubic foot for all blocks containing more than two hundred cubic feet. If I deliver the stone at the site of the building, an addition of (10c.) ten cents per cubic foot must be made to the above prices.

I can commence delivery of stone as soon as the contract is awarded me, and can deliver from (3,000) three thousand cubic feet to (6,000) six thousand cubic feet per week. The average stones produced from my quarry contain (100) one hundred cubic feet, but I can quarry blocks of any size than can be handled.

I am further prepared to comply with all the requirements of the advertisement; my stone is sufficiently known to need no reference.

JOHN M. MUELLER.

Claimant received the following notice of the acceptance of his proposal:

TREASURY DEPARTMENT,
OFFICE OF SUPERVISING ARCHITECT,
Aug. 26 1872.

SIR: You are hereby notified that your proposal to furnish all the dimension stone that may be needed for the exterior of the new custom-house building to be erected in the city of Chicago, for the sum of $1.30 per foot for all stones whose schedule dimensions do not exceed one hundred cubic feet, $1.35 per foot for all stones whose schedule dimensions exceed one hundred and do not exceed one hundred and fifty feet, and $1.47½ per foot for all stones whose schedule dimensions exceed one hundred and fifty and do not exceed two hundred feet—the stone to be delivered at the site of the building and in such quantities and at such times as the Department or its duly authorized agent may direct—is accepted.

A contract will be prepared and forwarded to you without delay, which you will please execute and return for the formal approval of the Secretary of the Treasury.

Very respectfully,

A. B. MULLETT,
Supervising Architect.

JOHN M. MUELLER, Esq.,
Cincinnati, Ohio.

September 2, 1872, a contract, in pursuance of said advertisement and proposal, was made between the United States and the claimant, which is as follows:

This contract, made and entered into this second day of September, A. D. 1872, by and between Alfred D. Mullett, Supervising Architect of the United States Treasury Department, for and in behalf of the United States of America, of the first part, and John M. Mueller, of Cincinnati, Ohio, of the second part, to whom was awarded a contract for certain dimension stone required in the construction of the new custom-house, court-house, and post-office building at Chicago, Illinois, on his bid received under advertisement, and dated July 23, A. D. 1872, witnesseth:

That the party of the second part covenants and agrees to and with the party of the first part to furnish from a quarry known as the California quarry, situate in the county of Adams, and State of Ohio, and from such part of the ledge of stone in said quarry known as the City Ledge as may be designated by the Supervising Architect or his duly authorized agent, and deliver at the site of the aforesaid building all of the dimension stone that may be required in the construction of said building.

And the party of the second part further agrees to furnish and deliver one hundred thousand cubic feet of the said stone at the site of the said building on or before the first day of January, A. D. 1873, and the remainder at such times and in such quantities as may be required by the party of the first part, or his duly authorized agent; and that the said stone shall be of the best quality to be obtained from the quarry aforesaid, and of uniform color, free from flaws, strains, or discoloring matter, and to the entire satisfaction of the party of the first part.

And the party of the first part, acting for and in behalf of the United States, doth covenant and agree to pay, or cause to be paid, unto the said party of the second part, or to his heirs, executors, adminstrators, or assigns, in lawful money of the United States, the sum of one dollar and thirty cents ($1.30) per cubic foot for every cubic foot in stones whose scheduled dimensions do not exceed one hundred cubic feet; and one dollar and thirty-five cents ($1.35) per cubic foot for every cubic foot in stones whose scheduled dimensions exceed one hundred cubic feet and do not exceed one hundred and fifty cubic feet; and one dollar and forty-seven and one-half cents ($1.47½) per cubic foot for every cubic foot in stones whose scheduled dimensions exceed one hundred and fifty cubic feet; the stone to be furnished according to schedule of net sizes to be furnished by the party of the first part, one-half (½) inch to be added to said schedule sizes for every worked face for quarried dimensions.

Payments to be made for the stone in the following manner, viz, ninety (90) per cent. (nine-tenths) of the value of each schedule, to be paid on its delivery at the site of the building; and (10) ten per cent. (one-tenth) thereof will be retained until the completion of the entire contract, and the approval and acceptance of the same by the party of the first part, which amount shall be forfeited by the party of the second part in the event of the non-fulfillment of this contract to the entire satisfaction of the party of the first part; and the said party of the second part further covenants and agrees to and with the party of the first part to lease, and hereby does let and lease, his quarry, known as the California quarry, situate in the county of Adams, in the State of Ohio, as aforesaid, with all and singular the tools, buildings, railroad, and equipments, wharves and appurtenances thereunto appertaining, unto the said party of the first part, with the full right, authority, and power to enter upon, occupy, and use the same, or procure therefrom any or all such stone as the party of the first part may require for the construction of the said building; and said lease shall continue in full force until the final completion of the delivery of the dimension stone required for the said building, it being understood and agreed that the object of this lease is to secure to the party of the first part a sufficient and suitable supply of dimension stone for the said building from the quarry aforesaid, and that such entry or occupancy of the said premises shall not be made by the party of the first part unless the party of the second part shall be in default, and unless the party of the first part shall give to the party of the second part twenty (20) days' notice of intention to do so, said notice to be in writing and served personally upon or left at the shop, office, or usual place of abode of the said party of the second part, or with his agent or agents; and in the event of default or failure to comply with the conditions of this contract at the expiration of the said twenty (20) days the party of the first part shall enter into full and complete possession of the said quarry, with its appurtenances as aforesaid, and shall work the said quarry at the expense of the said party of the second part; and the full expense of said working and procuring the stone, and of shipping, boxing, and delivering the same at the site of the building aforesaid, shall, after deducting the value of the stone as heretofore ageeed, be increased by fifteen (15) per centum, which sum shall be deducted from any money or moneys which may be due said party of the second part; and if that amount be not due said party of the second part, then his sureties are to be held liable

for any deficiency, to be recovered from them by suit in the name of the United States. And in the event of any such entry, occupancy, or use under this contract or lease, the quarry shall be worked by the party of the first part, or under his direction, in such workmanlike manner as not unnecessarily to injure the same; and the appurtenances shall be kept in good repair, usual wear and tear excepted, and the premises and appurtenances shall be duly released and restored to the party of the second part, or his legal representatives, without unnecessary delay whenever the purpose of this lease as herein declared shall have been accomplished.

It is further covenanted and agreed between the parties to this contract that the party of the second part shall execute, with two or more good and sufficient sureties, a bond to the United States in the sum of one hundred thousand dollars ($100,000), conditioned for the faithful performance of this contract and the agreements and covenants herein made by said party of the second part.

It is also covenanted and understood that no member of Con-
16 gress, or other person whose name is not at this time disclosed, shall be admitted to any interest in this contract; and it is further covenanted and agreed that this contract shall not be assigned except by consent of the Secretary of the Treasury, and that any assignment thereof except as aforesaid will be a forfeiture of the same.

It is further covenanted and agreed by and between the parties hereto that this contract shall be valid and binding when approved by the Secretary of the Treasury, and not otherwise, and no departure from its conditions shall be made withont his written consent.

In witness whereof the parties hereto have hereunto subscribed their names and affixed their seals the day and year first above written.

A. B. MULLETT, [SEAL.]
Supervising Architect.

Witnesses to the signature of the Supervising Architect:
A. G. MILLS.
T. E. MAJOR.

JOHN M. MUELLER. [SEAL.]

Witnesses to the signature of the contractor:
A. G. MILLS.
WM. H. HOFFMAN.

[20 cents internal-revenue stamps, canceled.]

The said contract was duly approved by the Secretary of the Treasury, October 5, 1882.

The required bonds accompanied the proposal and the contract.

II.

The following advertisement was published October 14, 1872:

Proposals for cutting the Buena Vista stone for the basement story of the new Government building at Chicago, Ill.

OFFICE OF SUPERINTENDENT,
Chicago, October 14, 1872.

Sealed proposals will be received at this office until 12 m. of the 26th day of October, 1872, for cutting required to be done on the Buena Vista

freestone to be used in the basement story, sill, and lintel course, and area walls of the new Government building at Chicago, Ill.

The stone stock will be delivered to the contractor for cutting at any point within 12 blocks of Twelfth street and the Illinois Central Railroad, free of charge, the contractor to deliver it on the site of the building cut and ready for setting, free from all flaws of any and every kind, promptly, and as required by the superintendent, so that the progress of the work will not be interrupted.

The cutting to be done according to the specification, drawings, and samples to be seen at this office.

Payments will be made monthly, deducting 10 per cent. until completion of the contract.

All proposals must be made on the printed form to be obtained at this office, and must be accompanied by a penal bond in the sum of ten thousand dollars ($10,000), that the bidder will accept and perform the contract if awarded him. The sufficiency of the surety to be certified by the United States judge, clerk of the United States court, or the district attorney of the district where the bidder resides.

The right to reject any or all bids is reserved.

Proposals must be inclosed in a sealed envelope, indorsed "Proposals for stone-cutting of basement story new Government building, Chicago, Ill.," and addressed to

J. C. RANKIN,
Superintendent.

To this claimant made the following proposal:

Proposal for cutting for the basement story, sill, and lintel course, and area walls of the new Government building at Chicago, Ill.

CHICAGO, *October* 26, 1872.

The undersigned proposes to execute the cutting for the above work in accordance with the specifications, drawings, and sample furnished, and to the satisfaction of the Supervising Architect, for the gross sum of ($41,000) forty one thousand dollars.

Hereto attached find bond required by advertisement.

Respectfully,

JOHN M. MUELLER.

This proposal was accompanied by an acceptable guaranty bond.

17 December 9, 1872, the following contract was made, and January 2, 1873, was approved by the Secretary of the Treasury; claimant gave an acceptable bond:

Contract between the United States of America and John M. Mueller.

This contract, made and entered into by and between James C. Rankin, superintendent, for and in behalf of the United States of America, of the first part, and John M. Mueller, to whom was awarded contract for cut-

ting Buena Vista freestone for basement story, sill, and lintel course of new custom-house at Chicago, Illinois, on his bid for the same, received under advertisement dated October 14, A. D. 1872, of the second part, witnesseth:

That the party of the second part covenants and agrees to and with the party of the first part to furnish the cutting of the Buena Vista freestone to be used in the basement story, sill, and lintel course of the new Government building at Chicago, Illinois, in accordance with the specification hereto attached. All of the stone for the area walls will require to be cut, lewised, and ready for setting on or before the first day of March, A. D. 1873, and the pier-stones and sill and lintel course as soon thereafter as required by the party of the first part.

And the said party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay, or cause to be paid, unto the said party of the second part, or to his heirs, executors, administrators, or assigns, in lawful money of the United States, the sum of forty-one thousand dollars ($41,000), payments to be made in the following manner, viz:

Ninety per cent. (nine-tenths) of the value of material delivered will be paid from time to time in monthly payments (the said value to be ascertained by the superintendent), and ten per cent. thereof (one-tenth) will be retained until the completion of the entire work and the approval and acceptance of the same by the superintendent; which amount shall be forfeited by said party of the second part in the event of the non-fulfilment of this contract to the entire satisfaction of said superintendent.

It is further covenanted and agreed by and between the parties to this contract that if, from any cause whatever, the said party of the second part should fail in required promptness in delivering the cut stone by or within the time or times specified above, he shall forfeit the sum of one hundred dollars per diem for each and every day's delay caused by the non-delivery of said cut stone, which sum shall be deducted from any moneys which may be due him; and if that amount be not due him, then his bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States.

It is further covenanted and agreed between the parties to this contract that the party of the second part shall execute, with two or more good and sufficient sureties, a bond to the United States in the sum of ten thousand dollars, conditioned for the faithful performance of this contract, and the agreements and covenants herein made, by the said party of the second part.

It is also covenanted and understood that no member of Congress, or other person whose name is not at this time disclosed, shall be admitted to any interest in this contract; and it is further covenanted and agreed that this contract shall not be assigned except by consent of the Secretary of the Treasury; and that any assignment thereof, except as aforesaid, will be a forfeiture of the same.

It is further covenanted and agreed by and between the parties hereto that this contract shall be valid and binding when approved by the Secretary of the Treasury, and not otherwise, and no departure from its conditions shall be made without his written consent.

In witness whereof the parties hereto have hereunto subscribed their names and affixed their seals this 9th day of December, A. D. 1872.

J. C. RANKIN. [SEAL.]

Witnesses to the signature of the superintendent:

E. B. SACKETT.

J. W. DICKSON.

JOHN M. MUELLER. [SEAL.]

Witnesses to the signature of the contractor:

S. E. MINER.

ROBERT M. WOODS.

III.

July 18, 1873, claimant entered into another contract with the United States, whereby he agreed to furnish the skilled labor, shops, ma-
18 chinery, &c., necessary to cut, dress, and box all the stone required for the construction of the said building, which contract was in writing, and was duly approved by the Secretary of the Treasury August 6, 1873, and is as follows:

Contract between the United States of America and John M. Mueller.

This contract, made and entered into by and between James C. Rankin, superintendent of the construction of the new custom-house, &c., at Chicago, Illinois, for and in behalf of the United States of America, of the first part, and John M. Mueller, of the city of Cincinnati, O., to whom was awarded the contract for supplying Buena Vista freestone for the construction of the new custom-house, post-office, &c., at Chicago, Illinois, on his bid for the same, received under advertisement, and dated July 23rd, A. D. 1872, of the second part, witnesseth:

That the party of the second part covenant and agree to and with the party of the first part to furnish such number of mechanics and laborers as may be required from time to time by the party of the first part, and all of the tools and materials necessary to cut, dress, and, if necessary, box all of the Buena Vista freestone required for the construction of the new custom-house building at Chicago, Illinois, and to cut such stone in such manner and at such place as may be required by the party of the first part; and it is further agreed that all shops, sheds, and machinery necessary to cut, dress, and box said stone shall be furnished by the party of the second part free of cost to the Government. And it is further agreed that all materials required for the cutting or boxing of said stone shall be supplied only upon the requisition of the party of the first part; and it is also agreed that not less than two hundred and fifty stone-cutters, with the necessary complement of mechanics and laborers, shall be employed at any time during the progress of the work.

And the said party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay, or cause to be paid, unto the said party of the second part, or to his heirs, executors, administrators, or assigns, in lawful money of the United States, for the labor, full market rates of the labor actually performed, increased by fifteen per centum, and for the materials the lowest trade prices, increased by fifteen per centum thereof, payments to be made in the following manner, viz: The amounts paid by the party of the second part for labor and

materials during each month, with the per centum, will be paid in monthly payments upon pay-rolls of mechanics and laborers, to be certified by the party of the first part, and upon the bills for materials, also certified by that officer. It is further covenanted and agreed by and between the parties to this contract that if, from any cause whatever, the said party of the second part should fail in required promptness in supplying materials and labor and cutting said stone by or within the time or times specified above, it shall become the duty of the said superintendent, and he shall be, and hereby is, authorized and empowered, after eight days' due notice thereof in writing, served personally upon or left at the shops, office, or usual place of abode of the said party of the second part, or with his agent, without effect, to purchase and supply any deficiency of materials and labor caused by the delinquency of the said party of the second part, and the actual cost thereof, together with fifteen per cent. thereon, shall be deducted from any moneys due or owing to the said party of the second part on account of this contract; and if that amount be not due him, then his bondsmen are to be held liable for any deficiency, to be recovered of them by suit, in the name of the United States; or the said party of the first part may elect that if the party of the second part should fail to supply the material and labor required by or within the time or times specified above, that he shall forfeit the sum of five hundred dollars per diem for each and every day thereafter until the final completion of said cutting, which sum shall be deducted from any moneys which may be due him, and if that amount be not due him, then his bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States.

It is further covenanted and agreed between the parties to this contract that the party of the second part shall execute, with two or more good and sufficient sureties, a bond to the United States in the sum of fifty thousand dollars, conditioned for the faithful performance of this contract and the agreements and covenants herein made by the said party of the second part.

It is also covenanted and understood that no member of Congress or other person whose name is not at this time disclosed shall be admitted to any interest in this contract; and it is further covenanted and agreed that this contract shall not be assigned except by consent of the Secretary of the Treasury, and that any assignment thereof as aforesaid will be a forfeiture of the same.

It is further covenanted and agreed by and between the parties hereto that this contract shall be valid and binding when approved by the
19 Secretary of the Treasury, and not otherwise, and no departure from its conditions shall be made without his written consent.

In witness whereof the parties hereto have hereunto subscribed their names and affixed their seals this 18th day of July, A. D. 1873.

J. C. RANKIN, [SEAL.]
Superintendent.

Witnesses to the signature of the superintendent:
C. A. MONTROSS.
B. M. WOODS.

JOHN M. MUELLER. [SEAL.]

Witnesses to the signature of the contractor:
L. KENNEDY.
J. W. DICKSON.

IV.

August 4, 1873, the claimant entered into another contract with the United States, whereby he agreed to furnish all the labor, shops, machinery, tools, &c., necessary to saw stone by him furnished for said building, which contract was in writing, and was duly approved by the Secretary of the Treasury on the 9th day of August, 1873, and is as follows:

Contract between the United States of America and John M. Mueller.

This contract, made and entered into by and between James C. Rankin, superintendent of the construction of the U. S. custom-house building at Chicago, Illinois, for and in behalf of the United States of America, of the first part, and John M. Mueller, of the city of Cincinnati, Ohio, to whom was awarded the contract for sawing Buena Vista freestone for the construction of the new custom-house at Chicago, Illinois, on his bid for the same, dated July 19th, A. D. 1873, of the second part, witnesseth:

That the party of the second part covenants and agrees to and with the party of the first part to furnish all the tools, machinery, shops, and sheds, &c., required to saw, and to saw such stone of the Buena Vista freestone supplied under his contract dated September 2nd, A. D. 1872, for the construction of the new custom-house building at Chicago, Illinois, as may be found necessary by the party of the first part; and it is further agreed that no quarry dimensions will be allowed on such faces of the stone as may be sawn under this contract, or that the allowance of one-half inch on each worked face of the stone supplied as fully set forth in the contract hereinbefore specified is hereby surrendered by the party of the second part on such faces as may be sawn. The sawing to be done at such times and in such quantities as the party of the first part may require. And the said party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay or cause to be paid unto the said party of the second part, or to his heirs, executors, administrators, or assigns, in lawful money of the United States, the sum of thirty-five cents (35c.) per superficial foot face measure for all stone sawn.

Payments to be made in the following manner, viz, ninety per cent. (nine-tenths) of the value of the sawing performed will be paid from time to time in monthly payments, the said value to be ascertained by the superintendent, and ten per cent. thereof (one-tenth) will be retained until the completion of the sawing and the approval and acceptance of the same by the superintendent, which amount shall be forfeited by said party of the second part in the event of the non-fulfilment of this contract to the entire satisfaction of said superintendent.

It is further covenanted and agreed by and between the parties to this contract, that if from any cause whatever the said party of the second part should fail in required promptness in sawing the stone required to be sawn by or within the time or times specified above, it shall become the duty of the said superintendent, and he shall be, and hereby is, authorized and empowered after eight days' due notice thereof, in writing, served personally upon or left at the shop, office, or usual place of abode of the said party of the second part or with his agent, without effect, to purchase and supply any deficiency of said sawing caused by the delinquency of the said party

of the second part, and the actual cost thereof, together with fifteen per cent. thereon, shall be deducted from any moneys due or owing to the said party of the second part on account of this contract, and if that amount be not due him then his bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States, or the said party of the first part may elect that if the party of the second part should fail to saw such stones as may be required by or within the time or times specified above, that he shall forfeit the sum of one hundred dollars ($100.00) per diem for each and every day thereafter, until the final completion of the sawing required, which sum shall be deducted from any moneys which may be due him, and if that amount be not due him, then his bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States.

It is further covenanted and agreed between the parties to this contract that the party of the second part shall execute, with two or more good and sufficient sureties, a bond to the United States in the sum of five thousand dollars ($5,000) conditioned for the faithful performance of this contract, and the agreements and covenants herein made by the said party of the second part.

It is also covenanted and understood that no member of Congress or other person whose name is not at this time disclosed, shall be admitted to any interest in this contract; and it is further covenanted and agreed that this contract shall not be assigned except by consent of the Secretary of the Treasury, and that any assignment thereof except as aforesaid will be a forfeiture of the same.

It is further covenanted and agreed by and between the parties hereto that this contract shall be valid and binding when approved by the Secretary of the Treasury, and not otherwise, and no departure from its conditions shall be made without his written consent.

In witness whereof the parties hereto have hereunto subscribed their names and affixed their seals this 4th day of August, A. D. 1873.

J. C. RANKIN, [SEAL.]
Superintendent.

Witnesses to the signature of the superintendent:
CHAS. A. MONTROSS.
W. W. MCPHERSON.

JOHN M. MUELLER. [SEAL.]

Witnesses to the signature of the contractor:
L. KENNEDY.
R. M. WOODS.

V.

At the time the contract was made for furnishing the dimension stone the claimant was the owner of a quarry known as the "California Quarry," situated in Adams County, in the State of Ohio. This quarry is about one hundred miles above the city of Cincinnati, and near the Ohio River. The stone-producing land consisted of from 4,500 to 4,600 acres, and was provided with machinery, railroad tracks, locomotive engines, hoisting apparatus, and so forth, and was of great value.

The claimant owned, also, a large establishment on Front street, in the city of Cincinnati of great value. To accommodate the exigencies of these

contracts, the facilities and instrumentalities of these two establishments were largely increased, as an entirety, by the expenditure of large sums of money thereon by the claimant.

VI.

During the performance of the contract of September 2, 1872, claimant was required by the United States to furnish 49 stones, whose scheduled dimensions exceeded 200 cubic feet. The quarry dimensions (being one-half inch added to the schedule sizes for each worked face) of these 49 stones amounted to 11,033.7 cubic feet. He furnished also 16 stones whose schedule dimensions were less than 200 cubic feet, but whose quarry dimensions were greater. The aggregate quarry contents of the 49 stones and the 16 stones were 14,350 cubic feet. For all of these he has been paid at the rate of $1.47\frac{1}{2}$ per cubic foot quarry dimensions. The 49 stones above mentioned were reasonably worth 25 cents more than $1.47\frac{1}{2}$ per cubic foot.

21

VII.

The stone produced by the quarry of the claimant, mentioned in the findings, was what is known as "freestone," and was more or less porous, and, as was well known to the agent of the United States at the time the agreement was concluded, had to be quarried a sufficient time before freezing weather to give it an opportunity to "season" or become dry, otherwise the stone was in danger of freezing and breaking, and would thereby become comparatively worthless. The quarrying season usually began about the first of May, and ended about the middle of October in each year.

The "schedules of net sizes" of stones, which the United States agreed by the terms of the contract to furnish, were not furnished in the autumn of 1872, in time, for the reason that the clerical force of the office of the Supervising Architect was insufficient. The claimant was urgent in his demands for the plans and schedules in order that he might get out the stone for the building before cold weather should set in.

From two to three months are required for seasoning stone of the character produced by the quarry of the claimant, depending somewhat upon the size of the stone.

In the course of dealings with the contractor deductions were made from vouchers on account of loss of stock, loss of sawing, and loss of cutting, for which he had been previously paid. These deductions aggregated $6,062.92 as follows: Loss of stock, $3,005.41; loss of sawing, $860.10; loss of cutting, $2,348.38. When a stone was received it was inspected before it went to the cutters; if accepted Mueller was paid for it. After cutting it was again inspected, and if found badly cut the stone had to be replaced. To do this a deduction was made from the next voucher of the cost of stock. If the cutting developed hidden defects, which rendered the stone unfit for the purpose for which it was purchased, the cost of cutting and the cost of stock were also deducted. Sometimes also stone when taken from the cars would look well, but when taken to the sheds for cutting manifested imperfections. Then the cost of stock would be deducted from the next voucher. Eight or ten stone burst because quarried too late in the season. The dimensions of these are not ascertainable from the

evidence. As they burst while in the rough and before acceptance they are not included in these deductions. No deductions were made for any stone furnished in the winter of 1872–'73.

Four or five pieces of stone were broken after the stock and cutting had been paid for, by reason of a thaw setting in and rendering uneven the frozen ground on which they were piled. That any deduction was made for these is not shown.

The vouchers upon which the deductions were made each contained a statement of the amount of the deduction, the number of feet for which it was made, and whether for stock, cutting, or sawing; the deduction was on the face of the voucher and showed the purpose for which it was made. The receipt at the bottom was signed by claimant without protest or objection, and was couched in the following language:

"Received Chicago, this —— day of ———, from ——— ———, the sum of [the face value of the voucher less the deduction] in full payment of the above account."

22 VIII.

On the 13th May, 1875, claimant was directed to stop shipment of stone until further orders, and on the 15th he was directed to stop cutting. On the 25th May he was notified formally, in accordance with the language of the contract, "that the party of the first part does not require that any more stock should be delivered at the present time. Whenever more is required you will be notified." On the 16th October, 1875, he was notified to resume cutting. In the summer and fall of 1877, when the work was nearing completion, he was directed to discharge workmen from time to time, so that the number was reduced below the minimum fixed in his contract. The work of sending forward stone was also resumed about the middle of October and continued until about the 1st December. The second suspension lasted until about the middle of February.

These suspensions arose from a well-founded doubt as to the desirability of completing the Chicago custom-house with the Buena Vista stone, and on the site. Several commissions made lengthy and exhaustive examination of the foundation and stone, pending which the United States stopped the work.

The damages resulting to the claimant therefrom were $20,000.

IX.

All stone furnished by claimant was delivered in accordance with schedules taken from the plans; these indicated the dimension of each stone and its location in the building. The receiving agent would take the schedule (or a copy) accompanying the shipment, and check off the stones that corresponded to the schedule; any stones that did not correspond were not accepted. The schedule as checked off then was attached to and became part of the voucher. It does not appear that any stone tendered by claimant and accepted by the officers of the United States remains unpaid for.

X.

The approaches or steps leading up into the building required, according to the plans for said building, a large quantity of cut dimension stone,

to wit, 17,473.10 cubic feet, and although the claimant was able and willing to furnish the same under his agreement, the officers of the United States refused to permit him to furnish the same, but it does not appear that he made any proposition to furnish it.

The defendants determined that granite would be more suitable than sandstone for these approaches, and the amount required was furnished by other parties. If the claimant had been allowed to furnish sandstone he would have made a profit of $6,115.58.

CONCLUSION OF LAW.

Upon the foregoing findings of facts the court decides, as conclusion of law that the claimant is entitled to recover the sum of $22,758.25.

23 V.—*Opinion of the court.*

SCOFIELD, J., delivered the opinion of the court.

In 1872 and 1873 the claimant made four several contracts with the Government to furnish and prepare the stone for the Chicago custom-house. By the first he agreed to furnish all the stone required in the rough. By the second he agreed to cut the stone for the basement story, sill, and lintel course. By the third he agreed to furnish mechanics, laborers, tools, shops, and machinery for cutting the stone, and cut the same. By the fourth he agreed to furnish labor, tools, and shop, and saw all the stone required to be sawed.

These contracts are set forth in the above order in Findings I, II, III, and IV. All were completed. In the progress of the work several disputes arose, which are now brought here for adjudication.

The first dispute relates to the price to be paid for sixty-five stones whose dimensions exceed 200 cubic feet each. The facts are presented in Finding VI. The claimant has already been paid at the rate of $1.47½ a cubic foot. The contract provides that he shall be paid at that rate for all stones exceeding 150 cubic feet. The claimant insists that he was not bound to furnish stone exceeding 200 cubic feet, and for such as he did furnish he should receive an advance in the price.

Considering that the cost of getting out and transporting stone of large dimensions increases rapidly as the size increases, it would seem unreasonable that there should be no limit to the size that might be demanded for the same price. Without a limit, claimant might be required to furnish stone containing 300 or 400 cubic feet or as large as an ambitious architect might propose. The advertisement states "the size of the stones cannot now be given; the largest stones will not probably contain over 200 cubic feet." Claimant's proposal, in reply, was to the effect that "he would furnish the stones containing from 150 to 200 cubic feet at $1.47½ and 25 cents extra per cubic foot for all blocks containing more than 200 cubic feet." The letter of acceptance says, "$1.47½ per foot for all stones whose schedule dimensions exceed 150 and do not exceed 200 feet." If the advertisement, proposal, and letter of acceptance can be taken, it is quite evident that at least $1.72½ was to be paid for these large stones.

By the common-law rule all prior understandings are merged in the final contract. That rule cannot be so strictly applied to Government contracts,

because they are required to be made by advertisements, bids, and acceptance. If this rule were to be strictly applied to such contracts, the agents of the Governments having gone through the formality of advertising, could make important changes without submitting them to the publicity and competition required by law. In Harvey v. United States (105 U. S., 688–'89) the Supreme Court said:

"The written bid, in connection with the advertisement and acceptance of that bid, constituted the contract between the parties so far as regards the question whether the contract prices embraced the coffer-dam work. (Gorfielde v. United States, 93 U. S., 242; Equitable Insurance Co. v. Hearne, 20 Wall., 496.) The written contract, in that respect, was intended by both parties to be merely a reduction to form of the statement as to work and prices contained in the bill. If the formal contract is susceptible of a different construction, to the prejudice of the contractors, it is very plain that not only the contractors but the officers of the Government were under a mistake."

24 For the reason above stated, and under this ruling of the Supreme Court, we feel authorized, in order to ascertain the intention of the parties, to examine, in connection with the contract, the advertisement, proposal, and acceptance. From all these papers combined we derive the conclusion that it was the intention of both parties that all stone exceeding 200 cubic feet should be paid for at the rate of $1.72½ a cubic foot. Of the sixty-five large stones sixteen were above 200 feet by quarry dimension, and below it by schedule dimension. By the contract the divisions by sizes were to be made according to schedule dimension. The sixteen stones must therefore be classed with those below 200 feet. With this view of the law, the claimant is entitled to recover $2,758.25 for the forty-nine stones, in addition to the amount already paid him.

A second dispute grows out of the facts presented in Finding VII. In the several partial settlements with the claimant the defendants made deductions in his pay, from time to time, for broken, discolored, and imperfect stones, amounting in all to $6,062.92. The only question was as to whose fault occasioned the loss. Each party now attributes it to the other. We do not enter upon this inquiry because the parties appear to have considered and settled it for themselves at the time. The deductions claimed or agreed upon were put in the several pay-bills, and the claimant receipted them in full. These settlements should not be disturbed unless it appears that the parties made mistakes in fact, which is not shown.

A third dispute grows out of the facts stated in Findings VIII.

During the progress of the work it came to be apprehended that a bad site had been selected, and that this kind of stone was unfit for such a building. About the middle of May, 1875, the work was stopped and an investigation made. About the middle of October following the work was resumed.

In the autumn of 1877 the work was again suspended for the same reason, and resumed about the middle of February following.

The court has found that these delays resulted in a loss to the claimant of $20,000.

It is said that the defendants had a right under the several contracts to demand these interruptions. The clauses relied upon to sustain the position are taken from the first and third contracts presented in Findings I

and III respectively. In the first contract claimant agrees, after the first 100,000 feet are delivered, "to furnish and deliver the remainder at such times and in such quantities as may be required by the defendants or their duly authorized agent." In his third contract he agrees "to furnish such number of mechanics and laborers as may be required from time to time" by the defendants and "to cut such stone in such manner and at such place as may be required by the defendants." This word "required" in similar connection occurs very often in Government contracts. This court has had frequent occasion to pass upon its force and meaning. In some cases it has been held to relate to the wants of the service; in others, to the unsettled purpose of the Government. In this case we think it should have the former construction. In the erection of so large a building there must necessarily be occasional delays. One part must often await the progress of other parts. Unavoidable accidents will often for short periods of time delay the whole. Such delays would doubtless be protected by the quoted language of the contracts. In this case the delay
25 was caused by a contemplated change of purpose. It was supposed that a bad site had been selected, and that the sandstone was not sufficiently ornamental or substantial for such a building. While the defendants deliberated the whole work was stopped. If this language would justify a delay of ten months for such a purpose, while the claimant waited with his labor, machinery, and capital, it would also justify a much longer delay, even to the practical abandonment of the work. Figh's Case (8 C. Cls. R. 319); United States v. Smith (94 U. S., 214).

We think the claimant is entitled to his reasonable damages, which is found to be $20,000.

The claimant alleges that a large amount of stone furnished by him and used in the building has not been paid for. The facts as stated in Finding IX do not sustain this item of his claim.

Upon the facts presented in Finding X the claimant demands a large amount of prospective profits. He had a right under his contract to furnish all the sandstone required for the building. The Government determined to use a harder and more enduring material for the approaches to the building, and contracted with other parties to furnish granite. In this there was no violation of the contract.

Some other claims are set forth in the petition, but they were abandoned upon the trial.

Judgment will be entered in favor of the claimant for the sum of $22,758.25.

26 VI.—*Final judgment.*

At a Court of Claims held in the city of Washington on the 26th day of May, A. D. 1884, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge, and decree that the said John M. Mueller do have and recover of and from the United States the sum of twenty-two thousand seven hundred and fifty-eight $\frac{25}{100}$ dollars ($22,758.25).

27 VII.—*Application of defendants for allowance of appeal.—Filed August* 22, 1884.

From the judgment rendered in the above-entitled cause on the 26th day of May, 1884, in favor of claimant, the defendants, by their Attorney-General, on the 22d day of August, 1884, make application for, and give notice of, an appeal to the Supreme Court of the United States.

THOMAS SIMONS,
Assistant Attorney General.

Allowed.

C. D. DRAKE, *C. J.*

28 VIII.—*Application of claimant for allowance of appeal.—Filed August* 23, 1884.

And now comes the said petitioner, John M. Mueller, and appeals to the Supreme Court of the United States from the judgment rendered in this cause by the Court of Claims, and prays that the same may be allowed accordingly.

ENOCH TOTTEN,
Att'y for Plaintiff.

Allowed.

C. D. DRAKE, *C. J.*

29 In the Court of Claims.

IX.

JOHN M. MUELLER
vs.
THE UNITED STATES. } No. 11962.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court, and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the defendants for allowance of appeal to the Supreme Court of the United States and the allowance of same, of the application of the claimant for allowance of appeal to said Supreme Court and the allowance of same by Chief Justice Drake.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this 29th day of August, A. D. 1884.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 1170. The United States, appellant, vs. John M. Mueller. No. 1171. John M. Mueller, appellant, vs. The United States. Court of Claims. Filed 24th October, 1884.

1170-1171

Office Supreme Court U. S.
FILED.
DEC 22 1884
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1884.

THE UNITED STATES
v.
MUELLER. } No. 1170.

AND

MUELLER
v.
THE UNITED STATES. } No. 1171.

BRIEF FOR THE UNITED STATES.

The facts are stated in the record,—*sufficiently* indeed, in the *opinion*.

On behalf of The United States it is submitted that the learned court below erred in giving judgment for the $20,000 assessed against them as damages for delaying the claimant in the delivery of stone. (See opinion, bottom of page 21, "A third dispute," &c.,

It is submitted that the *clauses* in the contract referred to by the learned court in that connection *did* authorize the delay in question.

That delay was not wanton, nor, when taken in connection with its cause, unreasonable. The *cause* thereof was one which fairly might have been anticipated by the United States as within the range of chances, and therefore as one in regard to the consequences of which they might well require contractors to share the risks.

It is therefore submitted that the word "require," quoted by the learned court, extends beyond the limits which they have assigned to it; and that, as is not infrequent in large contracts about public works, it places the contractor somewhat at the discretion of officials who whilst not actually interested upon the side of the other party are nevertheless in his employment and pay; (such as civil engineers constructing railroads, &c.). It has been thought that the word "require" covers the reasonable consequences of such accidents to a public work as that which necessitated the *consideration* and the delay here in question.

Instances of *excusable* delay in action by the Government upon contracts with them, (differing slightly from *this* in wording,) may be found in Chouteau's case 95 U. S., 61; Swift & Co.'s case, 14 C. Cl., 208; and see remarks in Brawley's case, 96 U. S., 168.

As to the error assigned upon cross-appeal, by the claimant—

It is submitted as plain that stone for the "approaches"

to a public building is not included within a contract for the stone required in the "construction" of such "building;" and therefore that after securing a contract for the latter, the former was still to be provided for on behalf of the United States.

S. F. PHILLIPS,
Solicitor-General.

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113-1170

Office Supreme Court U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1884.

Nos. 1,170, and 1,171.

UNITED STATES, *Appellant*,
vs.
JOHN M. MUELLER,

AND

JOHN M. MUELLER, *Appellant*,
vs.
UNITED STATES.

Brief for Mueller

These are cross appeals from a judgment of the Court of Claims in favor of the claimant in that court for the sum of $22,758.25. The court below in its "findings of fact" has succinctly set out the public invitation for proposals, the proposal of the contractor, the various contracts and the ultimate facts, and it is deemed unnecessary to give here any additional

Statement of Facts.

To restate the facts would be a useless repetition of the brief narrative in the record as given by the Court of Claims.

The only complaint which is made in behalf of the plaintiff against the conclusions of the Court of Claims, is that no allowance was made for the profits which the contractor might have made had he had been permitted by the officer of the defendant to furnish the "dimension stone" for the approaches to the building, and that is the sole

Assignment of Error.

The Court of Claims erred in refusing to allow the claimant the profits he would have made had he been permitted to furnish sandstone for the approaches to the building, to wit, *the sum of $6,115.58.*

Points and Authorities.

First. The invitation issued and published by the Government invited bidders to submit sealed proposals "for furnishing and delivering at the site of the proposed new United States Government building at Chicago, Illinois, *all of the dimension stone required in its construction.*"

The claimant submitted the following offer:

CICINNATI, *July 23d, 1872.*

I hereby propose to furnish dimension stone in accordance with the attached advertisement, delivered on the cars at Chicago, for the sum of one dollar and twenty cents ($1.20) per cubic foot for all blocks containing one hundred cubic feet (100) and under, and five (.05c.) cents extra per cubic foot for all blocks containing more than (100) one hundred cubic feet and less than (150) one hundred and fifty cubic feet,

(12½) twelve and a half cents extra per cubic foot for all blocks containing more than (150) one hundred and fifty cubic feet and less than (200) two hundred cubic feet, and (25c.) twenty-five cents extra per cubic foot for all blocks containing more than two hundred cubic feet. If I deliver the stone at the site of the building, an addition of (10c.) ten cents per cubic foot must be made to the above prices.

I can commence delivery of stone as soon as the contract is awarded me, and can deliver from (3,000) three thousand cubic feet to (6,000)six thousand cubic feet per week. The average stones produced from my quarry contain (100) one hundred cubic feet, but I can quarry blocks of any size that can be handled.

I am further prepared to comply with all the requirements of the advertisement; my stone is sufficiently known to need no reference.

JOHN M. MUELLER.

This proposal was accepted in writing, as follows:

TREASURY DEPARTMENT,
OFFICE OF SUPERVISING ARCHITECT,
Aug. 26, 1872.

SIR: You are hereby notified that your proposal to furnish all the dimension stone that may be needed for the exterior of the new custom house building to be erected in the city of Chicago, for the sum of $1.30 per foot for all stones whose schedule dimensions do not exceed one hundred cubic feet, $1.35 per foot for all stones whose schedule dimensions exceed one hundred and do not exceed one hundred and fifty feet, and $1.47½ per foot for all stones whose schedule dimensions exceed one hundred and fifty and do not exceed two hundred feet—the stone to be delivered at the site of the building and in such quantities and at such times as the Department or its duly authorized agent may direct—is accepted.

A contract will be prepared and forwarded to you without delay, which you will please execute and return for the formal approval of the Secretary of the Treasury.

Very respectfully,

A. B. MULLETT,
Supervising Architect.

JOHN M. MUELLER, ESQ.,
Cincinnati, Ohio.

A contract was thereupon made and concluded by the parties, in pursuance of these statutory preliminaries, and it bears date Sept. 2, 1872 (9). In this contract it is agreed:

> "That the party of the second part covenants and agrees to and with the party of the first part to furnish from a quarry known as the California quarry, situate in the county of Adams, and State of Ohio, and from such part of the ledge of stone in said quarry known as the City Ledge, as may be designated by the Supervising Architect or his duly authorized agent, and deliver at the site of the aforesaid building *all of the dimension stone that may be required in the construction of said building*."

The invitation for proposals asks for bids for "*all of the dimension stone* required in its construction." The proposal and the letter accepting it uses similar language. It is therefore submitted that the United States, by making a contract in 1880, for the material for the approaches, violated the agreement, and that the petitioner is entitled to recover the profits he would have made by furnishing the material for the approaches under his contracts. It cannot, and probably will not, be denied that these approaches were *necessary* in the construction of the building, and that they were made of "dimension stone." It will also be conceded that Mueller, although able and willing to furnish such stone, was not permitted or called upon to do so, and that a contract for *granite* approaches was awarded to and made with others. (20, 21.)

This claim will especially commend itsely to the Court, when it is remembered that the contractor received very unjust treatment from the outset. If the officers of the Government had not gone far out of their way to deprive the contractor of the only opportunity he could have had to furnish stone at a profit, he would have made $6,115.58; this would have been the only profit, too.

Second. It has been, and doubtless will again be, argued that, under the peculiar and loose language used by the defendant in drawing the contracts, the United States had the dangerous privilege of calling for the stone at any time, *i. e.*, in six months, in one, two, or even ten years, and that the contractor could not be heard to complain, but was estoped. The Court of Claims puts the case in this terse language (21):

> "A third dispute grows out of the facts stated in Finding VIII.
>
> "During the progress of the work, it came to be apprehended that a bad site had been selected, and that this kind of stone was unfit for such a building. About the middle of May, 1875, the work was stopped and an investigation made. About the middle of October following, the work was resumed.
>
> "In the autumn of 1877, the work was again suspended for the same reason, and resumed about the middle of February following.
>
> "The court has found that these delays resulted in a loss to the claimant of $20,000.
>
> "It is said that the defendant had a right under the several contracts to demand these interruptions. The clauses relied upon to sustain the position are taken from the first and third contracts presented in Findings I. and III. respectively. In the first contract claimant agrees after the first 100,000 feet are delivered 'to furnish and deliver the remainder at such times and in such quantities as may be required by the defendants or their duly authorized agent.' In his third contract he agrees 'to furnish such number of mechanics and laborers as may be required from time to time' by the defendants and 'to cut such stone in such manner and at such place as may be required by the defendants.' This word 'required' in similar connection occurs very often in Government contracts. This court has had frequent occasion to pass upon its force and meaning. In some cases it has been held to relate to the wants of the service; in others to the unsettled purpose of the Government. In this case, we think it

should have the former construction. In the erection of so large a building, there must necessarily be occasional delays. One part must often await the progress of other parts. Unavoidable accidents will often, for short periods of time, delay the whole. Such delays would doubtless be protected by the quoted language of the contracts. In this case the delay was caused by a contemplated change of purpose. It was supposed that a bad site had been selected, and that the sandstone was not sufficiently ornamental or substantial for such a building. While the defendants deliberated the whole work was stopped. If this language would justify a delay of ten months for such a purpose, while the claimant waited with his labor, machinery, and capital, it would also justify a much longer delay, even to the practical abandonment of the work. *Figh's Case* (8 C. Cls. R., 319); *United States* vs. *Smith*, (94 U. S., 214).

"We think the claimant is entitled to his reasonable damages which is found to be $20,000." See also *Behan* vs. *U. S.* (110 U. S., 338); *Lovell* vs. *Ins. Co.* (111 U. S., 264).

In this connection it will be instructive to remember, that the original contract of September 2, 1872, (9) contains covenants to the effect that the officers of the Government, in case of the non-fulfillment of the provisions of the contract by Mueller, might "enter upon, occupy and use," the claimant's quarry, and that "in the event of any such entry, occupancy, or use under this contract or lease, the quarry shall be worked by the party of the first part, or under his direction, in such workmanlike manner as not unnecessarily to injure the same; and the appurtenances shall be kept in good repair, usual wear and tear excepted, and the premises and appurtenances shall be duly released and restored to the party of the second part, or his legal representatives, *without unnecessary delay* whenever the purpose of this lease as herein declared shall have been accomplished."

The contract of July 18, 1873, (14) for cutting, dressing, and boxing stone, binds the contractor to keep employed, in every event, "*not less than two hundred and fifty stone-cutters, with the necessary complement of mechanics and laborers * * * at any time during the progrees of the work.*"

By the original invitation to bidders, the latter were required to state "how soon they can (could) commence the delivery of stone and the amount per week they can (could) deliver," and Müller in his proposal stated that he could commence the delivery as soon as the contract should be awarded to him, and that he could deliver the stone at the rate of from three to six thousand cubic feet per week, (8). All these circumstances amounted to an assurance to the bidders, that there should be no delays. They certainly indicated no such perilous delays as did occur through the vascillating purposes of the defendants' officers.

It is submitted that the Court of Claims should have rendered a judgment in favor of the claimant for $28,873.83, made up as follows:

For damages	$20,000.00
" the large stone	2,758.25
" profit he might have made by furnishing stone for the approaches	6,115.58
	$28,873.83

ENOCH TOTTEN,
For Mueller.